



MIKE PENCE, *Governor*
JAMAL L. SMITH, *Executive Director*

Case No.: 470-2013-00848

██████████,

Complainant,

v.

FEDERAL EXPRESS CORPORATION,
Respondent.

NOTICE OF FINDING

The Deputy Director of the Indiana Civil Rights Commission ("Commission"), pursuant to statutory authority and procedural regulations, hereby issues the following findings with respect to the above-referenced case. Probable cause exists to believe that an unlawful discriminatory practice occurred in this instance. 910 IAC 1-3-2(b).

On January 7, 2013, ██████████ ("Complainant") filed a Complaint with the Commission against Federal Express Corporation ("Respondent") alleging discrimination on the basis of race as well as sexual harassment in violation of the Indiana Civil Rights Law (Ind. Code § 22-9, *et seq.*) ██████████

██████████ Accordingly, the Commission has jurisdiction over the parties and the subject matter of this Complaint.

An investigation has been completed. Both parties have had an opportunity to submit evidence. Based on the final investigative report and a review of the relevant files and records, the Deputy Director now finds the following:

There are two issues before the Commission. The first issue is whether Respondent subjected Complainant to sexual harassment. In order to prevail, Complainant must prove that: (1) Respondent subjected him to unwelcomed comments because of his gender; (2) the conduct was sufficiently severe or pervasive such that it would interfere with a reasonable person's job performance; (3) Complainant made it known to Respondent that the behavior was unwanted; and (4) Respondent failed to take corrective action.

It is evident that Complainant is a member of a protected class by virtue of his gender; however, the alleged comments made toward Complainant were not sufficiently severe or pervasive to constitute sexually harassment. In this instance, Complainant alleges that in the Spring of 2012, his supervisor asked him if he "needed some lube or some Vaseline" and mentioned that he needed to keep him penis in his pants due to the number of children he had to one of Complainant's co-workers. Assuming *arguendo* that these comments were made,



they are insufficiently severe or pervasive to constitute sexual harassment as required under the law. While such comments, if uttered, are inappropriate, there is no probable cause to believe that Complainant was subjected to sexual harassment as alleged.

However, with respect to the second issue of disparate discipline because of race and gender, probable cause exists to believe a discriminatory practice occurred. In order to prevail, Complainant must show that (1) he engaged in prohibited conduct similar to that of a co-worker of another race and (2) the discipline levied against him was more severe than that levied against his Caucasian co-worker.

By way of background, at all times relevant to the Complaint, Respondent maintained an Acceptable Conduct Policy 2-5 which prohibited employees from engaging in disruptive conduct while on duty or while on company property, using violent, threatening, or abusive language, acting in an unprofessional or rude manner toward a customer while on duty, and other inappropriate behaviors. The policy also provided that violations of the policy could result in a warning letters, disciplinary suspensions without pay, or ultimately termination. Evidence shows that Complainant was hired in 1998 and terminated on or about December 31, 2012. During the course of his employment as a Part Time Material Handler, Complainant received numerous verbal and written counselings, but only two warning letters in the last 3 years of his employment. In 2012, Complainant received two written warnings from supervisor Sparkman for various violations of the Acceptable Conduct Policy 2-5. Specifically, on or about June 8, 2012, Complainant received a written warning for violating 2-5 due to poor attendance and another 2-5 violation for disruptive behavior on or about December 19, 2012.

Alternatively, his similarly-situated female Caucasian co-worker (Hill) received numerous verbal and written counselings, but only received 1 written warning for a violation of the Acceptable Conduct Policy 2-5. Specifically, on or about July 12, 2013, Complainant received a written warning regarding a violation of 2-5 because of a customer complaint about her conduct at their facility. Although the Manager of the Indy Hub location sent a letter to Hill on or about July 19, 2013 rejecting her application to a part time material handler position because of the July 12, 2013 warning, she was ultimately offered the position on or about July 22, 2013 by the Operations Manager. Equally suspicious, three independent witnesses assert that Hill was allowed to transfer to numerous sites after engaging in altercations with clients in contravention of Respondent's policy. Although there is no written evidence in the record, the witnesses assert that Hill was involved in an altercation with a client at the Amazon location in February 2013 but was permitted to transfer to the Pep Boys location that same month. The witnesses also allege that Complainant was involved in an altercation with a client at the Pep Boys location shortly after her transfer and was permitted to transfer to her current position at the Indy Hub. According to Respondent's policy, unprofessional conduct toward a client should constitute a violation of the Acceptable Conduct Policy 2-5; however, there is no evidence that Respondent disciplined Hill for these two incidents involving unprofessional conduct toward clients. Thus, it appears that Hill was treated more favorably than Complainant in that she engaged unprofessional conduct with clients but was not issued a written letter and was

permitted to transfer at least twice to other sites. No evidence has been provided by Respondent to show that Complainant was afforded such favorable treatment. As such and based upon the aforementioned, evidence shows that Respondent treated the similarly-situated Caucasian female employee more favorable under similar circumstances. Thus, based upon the above-findings, probable cause exists to believe that an unlawful discriminatory practice occurred in this instance.

A public hearing is necessary to determine whether a violation of the Indiana Civil Rights Law occurred as alleged herein. Ind. Code § 22-9-1-18, 910 IAC 1-3-5. The parties may agree to have these claims heard in the circuit or superior court in the county in which the alleged discriminatory act occurred. However, both parties must agree to such an election and notify the Commission within twenty (20) days of receipt of this Notice, or the Commission's Administrative Law Judge will hear this matter. Ind. Code § 22-9-1-16, 910 IAC 1-3-6.

April 14, 2014

Date

Akia A. Haynes

Akia A. Haynes, Esq.

Deputy Director

Indiana Civil Rights Commission